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No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,
v.
NICHOLAS DEMISAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONERS

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans (the "NCCMP") respectfully moves for leave to file the accompanying brief *amicus curiae* to urge the Court to review the decision below that all employer contributions to a multiemployer plan cannot be used to provide benefits to all plan participants, without regard to who employed them. Petitioners have consented to the filing of this brief; Respondents have not.

The NCCMP is a nonprofit, tax-exempt organization that was formed after the enactment of the Employee Re-

tirement Income Security Act of 1974 ("ERISA") to participate in the development of employee benefits legislation and government regulations promulgated to implement ERISA and other laws affecting multiemployer plans.[1] Currently, more than one hundred ninety multiemployer plans and related international unions, located in at least thirty-seven states, are affiliated with the NCCMP.[2] These plans are representative of all of the nation's multiemployer plans, which cover more than one million workers. If left unchallenged, the decision below will have an adverse impact on all multiemployer plans and, therefore, will be particularly adverse to the interest of NCCMP affiliates, which represent the majority of participants in multiemployer plans.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans. The NCCMP last participated as an *amicus curiae* before this Court in the case of *FMC Corp. v. Holliday*, 498 U.S. ——, 59 U.S.L.W. 4009 (1990).

In the instant case, we respectfully request this Court to review the issue of whether employer contributions to a multiemployer welfare or pension plan can be used for the benefit needs of all plan participants. The decision below would force plan trustees to operate multiemployer plans as aggregates of separate single employer plans, isolating the contributions of each employer to ensure that

[1] ERISA was amended in 1980 by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208 (1980). The NCCMP has been recognized as having had a "significant impact" on this statute by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed., July 24, 1980) and S10100 (daily ed., July 29, 1980).

[2] Petitioners are not affiliated with the NCCMP.

they be used only for that employer's employees. The NCCMP submits that the decision below will have far-reaching, negative consequences for the effective administration of multiemployer plans, inasmuch as these plans are established and maintained to use pooled trust assets for the benefit of all plan participants.

The NCCMP will limit its discussion to the conflict between the decision below—that an employer's contributions cannot be used for the benefit of other employers' employees—and the express terms of governing federal law and its legislative history, as well as the interpretation of that law by the judiciary and the executive.

Based on the foregoing, the NCCMP respectfully moves for leave to file the accompanying brief *amicus curiae.*

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Dated: November 1991

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONERS

INTRODUCTION

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") submits this brief *amicus curiae* to urge this Court to review the holding below, which contradicts the fundamental premise upon which multiemployer plans are established and administered: that all employers' contributions are available to provide benefits to any employer's employees.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. The NCCMP submits that a failure to review the decision

below would undercut the purpose and structure of multiemployer plans. If the proposition asserted by Appellants-Respondents and embraced by the court below—that an individual employer's contributions to a multiemployer plan may never be used for the benefit needs of another employer's employees—were accepted as true, the current multiemployer plan system would have to be completely restructured. Such a restructuring of multiemployer plans would conflict with the Congressional directive to encourage the establishment and maintenance of such plans to provide pension and welfare benefits.

The Congress, familiar with the way in which multiemployer plans operate, enacted ERISA with all of its trustee requisites, in order to ensure "the continued well-being and security of millions of employees and their dependents . . . directly affected by [employee benefit] plans." ERISA § 2(a), 29 U.S.C. § 1001(a). *See* 29 U.S.C. § 1001a. Neither in ERISA nor in Section 302 of the Labor Management Relations Act ("LMRA")[1] did Congress, expressly or otherwise, draw distinctions between multiemployer plan participants according to their allegiance to a particular employer, or artificially divide multiemployer plan contributions according to employer-employee alliances. The corpus of each multiemployer trust fund is established for all participants, without regard to whether particular employers or employees choose to discontinue their participation in the fund. As a national representative of multiemployer plan trustees, participants, and beneficiaries, the NCCMP submits that the decision below draws such employer-to-employee distinctions and, thereby, threatens the viability of all multiemployer plans.

SUMMARY OF REASONS FOR REVIEW

The NCCMP urges this Court to review the decision below, to prevent the eradication of the principles upon which multiemployer plans are founded and funded. The

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[1] 29 U.S.C. § 186.

decision below is based on the flawed presumption that the LMRA requires trustees to isolate each employer's contributions to ensure that no employer's contributions will be used to benefit participants who work for other employees. Yet, the multiemployer plans "pool" their administrative and financial resources—including contributions—in order to provide benefits to all eligible participants. As the name implies, a multiemployer plan relies on the contributions of all employers to provide particular levels of benefits to all eligible participants. Were the contributions of each employer isolated, the result would be an aggregate of separate plans, *see* Treas. Reg. § 1.414 (1), that would undercut the entire structure of multiemployer plans.

Multiemployer plans are simply not designed to effectuate the type of employer-to-employee match that the decision below advocates. Thus, LMRA Section 302(c)(5) provides that contributions are to be used for the sole and exclusive purpose of benefiting a contributing employer's employees "jointly with the employees of other employers making similar payments," 29 U.S.C. § 186(c)(5). The court below gave no consideration to this express statutory directive.

When Congress did consider and enact a comprehensive, highly-detailed amendment to ERISA, the Multiemployer Pension Plan Amendments Act ("MPPAA"), Congress carefully delineated the specific instances when employers are required to pay into a multiemployer fund, and when they are entitled to receive assets out of a fund—none of which include the situation presented in the instant case.

Moreover, the legislative history of the LMRA and ERISA do not provide any support for the proposition that an employer's contributions may never be used for other than its own employees. In fact, Congress time and again considered, debated—and ultimately rejected—the type of technical provisions that would accomplish the

fund-to-fund transfer that the decision below demands. Congress clearly did not enact the LMRA, ERISA, and MPPAA, in order to mandate, *sub silentio*, that multiemployer plans should operate as aggregates of single employer plans.

REASONS FOR REVIEW

I. SECTION 302(c)(5) OF THE LABOR MANAGEMENT RELATIONS ACT

The ruling below is based on the proposition that Section 302(c)(5) makes it unlawful for funds contributed by one employer to be used for the benefit of persons other than its employees. This proposition is contrary to the plain language of Section 302(c)(5) and the legislative history of that statute. This proposition has also been rejected by the United States Court of Appeals for the Seventh Circuit in *Stinson v. Ironworkers District Council of Southern Ohio & Vicinity*, 869 F.2d 1014, 1021 (7th Cir. 1989).

In *Walsh v. Schlecht*, 429 U.S. 401 (1977), this Court upheld a collective bargaining agreement provision that obligated a general contractor to contribute to multiemployer pension and welfare funds, where the contributions were based on the hours of work performed by a subcontractor's employees, none of whom were eligible to receive benefits. In holding that the provision did not violate LMRA Section 302, this Court expressly acknowledged that the general contractor's contributions satisfied the Taft-Hartley exclusive benefit rule, where the general contractor's contributions were being used "solely for the benefit of the employees of the petitioner [general contractor] and other signatory employers." *Schlecht*, 429 U.S. at 409.

This Court's recognition that one employer's contributions to a multiemployer plan are available to provide benefits to the employees of all employers flows from the plain language of LMRA Section 302(c)(5), which states

that employer contributions must be "for the sole and exclusive benefit of the employees of such employer . . . or of such employees . . . jointly with the employees of other employers making similar payments. . . ."

The Conference Report, accompanying the LMRA, mirrors the sole and exclusive benefit language of Section 302(c)(5) that employer contributions are to be used for the employees of the employer jointly with the employees of other employers. H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 67 (1947).[2]

Section 302(c)(5) does not distinguish between contributions to provide pension benefits and contributions to provide welfare benefits; the same language is used in the same sentence in the same statutory provision for both kinds of plans. And, the federal judiciary has recognized that one employer's contributions to a multiemployer plan can be used to fund the pension benefits of another employer's employees. As the First Circuit noted in *Berkshire Hathaway v. Textile Workers Pension Fund*, 874 F.2d 53, 55 n.2 (1st Cir. 1989), "multiemployer pension plans are structured as 'pooled' funds, such that some employers, in effect, 'subsidize' the employees of other employers." It defies logic and Article III of the Constitution for the court below to have rewritten the plain language of Section 302(c)(5).

The legislative history of the Taft-Hartley Act is replete with Congressional concerns about John L. Lewis

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[2] The United States General Accounting Office last year issued a report on welfare benefits entitled, "Employee Benefits: Extent of Multiemployer Plan Retiree Health Coverage" (GAO/HRD-90-132) (July 1990), with one of its primary focuses being the construction industry, as "[o]ver half of all multiemployer health plans and 62 percent of plans with retiree coverage are in the construction industry. . . . [W]orkers in the construction industry are considered to have an employment relationship with the industry as a whole rather than with any one company. The industry is best able to meet workers' and retirees' health needs collectively, through multiemployer plans." Report at 6-7.

using employer fringe benefit contributions to create a war chest for the United Mine Workers. *See, e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess. 53 (1947); 93 Cong. Rec. 4875-76 (daily ed. May 8, 1947). To address these concerns, the Congress enacted, *inter alia*, LMRA Section 302(c)(5). Consequently, the UMWA's Retirement and Welfare Plans have been required to comply with Section 302(c)(5) for over forty years. *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

On March 12, 1990, the Advisory Commission on United Mine Workers of America ("UMWA") Retiree Health Benefits was established to make recommendations to the Secretary of Labor on health care issues relating to these selfsame UMWA Welfare Plans. On November 5, 1990, the Commission issued its recommendation (the "Coal Commission Report") to the Secretary of Labor. Along with the Report, the Commission's Chairman (William J. Usery, Jr.) sent the Secretary an Executive Summary of the Report:

> In the last 10 years, the health care costs paid by the UMWA Health and Retirement Funds have doubled. . . . Much of the cost is attributable to "orphaned" retirees whose companies have gone out of business or ceased paying for health care benefits. More than half of the Funds' population is composed of orphan retirees. How to continue to provide health benefits to "orphans" is the essence of the problem. Signatory coal operators who are still in the coal business are willing to pay the fair cost of their retirees, but are increasingly unwilling to shoulder the burden of paying for orphans, which they view as an industry-wide problem.

Summary at iv. *See* Report at 81-88.

In other words, the Coal Commission reported to the Secretary of Labor that employers are contributing to provide benefits to other employer's employees. The decision below would equate this use of plain assets with a viola-

tion of LMRA Section 302, *i.e.*, a criminal act. Yet, the Coal Commission was not reporting about violations of Section 302. This was a report about an acknowledged and countenanced practice by multiemployer welfare plans to use employers' contributions collectively to provide benefits to employees without the restrictions that the court below engrafted on Section 302.

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT

ERISA is a comprehensive statute that dictates the duties of trustees in receiving, managing, investing, distributing, and transfering plan assets solely in the interest of participants and their beneficiaries. One of the primary purposes of enacting ERISA was to provide strict fiduciary standards for the governance of pension and welfare benefit plans where only general guidelines existed under the LMRA. "The [LMRA], *Sec. 302*, provides the *fundamental guidelines* for the establishment and operation of pension funds administered jointly by an employer and a union. The Act *is not intended to establish nor does it provide* standards for . . . fiduciary conduct." S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973) (emphasis supplied).[3]

The court below concluded that an employer's contributions to a multiemployer plan cannot be used for the benefit needs of other employers' employees. It is axiomatic, however, that multiemployer plans consist of the

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[3] "Although the [LMRA] established certain structural and procedural requirements for employee benefit plans in 1947, ERISA created numerous *higher standards* for the administration of such plans." *Cutaiar v. Marshall*, 590 F.2d 523, 530 (3d Cir. 1979) (emphasis supplied). *See also NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 (1981) (stating "[w]hatever may have remained implicit in Congress' view of the employee benefit trustee under the [LMRA] became explicit when Congress passed [ERISA]. ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet").

"pooled" assets of numerous employers. *See, e.g., Central States, SE & SW Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 562 (stating, as part of the factual background of the case, that each employer must make weekly contributions to the fund on behalf of each employee performing covered work, and that each plan consists of "thousands of participating employers"); *Berkshire Hathaway, Inc. v. Textile Workers Pension Fund*, 874 F.2d at 54 n.4. Similarly, the Internal Revenue Code provides that, with respect to multiemployer plans, "in determining whether the plan of an employer is for the exclusive benefit of his employees and their beneficiaries, all plan participants shall be considered to be his employees." I.R.C. § 413(a)(3).

Additionally, it cannot be disputed that some participants of multiemployer plans will receive benefits, while others will not. *See Ponce v. Construction Laborers Pension Trust Fund*, 582 F. Supp. 1310, 1314 (C.D. Cal. 1984), *aff'd*, 774 F.2d 1401 (9th Cir. 1985), *cert. denied*, 479 U.S. 890 (1986). Yet, the denial of benefits to even a single participant in a multiemployer plan has the effect of increasing the fund—*i.e.*, the pooled contributions of all employers—available to provide benefits to eligible employees of all employers. *Wilson v. Board of Trustees of the Pension Trust Fund for Operating Eng'rs*, 564 F.2d 1299, 1302 (9th Cir. 1977). In these cases, there was no attempt by the courts, the trustees, the employers, or the participants to accomplish what the court below held is mandated by law—preventing one employer's contributions to a multiemployer plan from ultimately benefiting the employees of other contributing employers—for such a result is completely contrary to the structure of multiemployer plans.

The *Berkshire* court accurately described multiemployer plans as "pooled funds," a description borne out by the fact that the contributions of some employers routinely pay for the unfunded benefits of employees whose em-

ployers have withdrawn from the multiemployer plan. *Central States*, 472 U.S. at 580, 581 n.22; *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1566 (D.C. Cir.), *cert. denied*, 469 U.S. 834 (1984); *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983). *See also J. Caflisch, Employer Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980*, 9 Pens. Rep. (BNA) 182, 189 (1982) ("part of the contributions to a plan go to amortize existing unfunded benefits") (hereinafter "Caflisch").

Thus, the premise underlying the holding below cannot possibly coexist with the LMRA, ERISA, or MPPAA, much less compel the fund-to-fund transfer directed by the court below. That is, if an individual employer's contributions to a multiemployer plan could never benefit the employees of any other employer, the employee-participants of a delinquent or insolvent employer could never receive welfare benefits, for the contributions of current employers could not be used to pay the benefits of anyone other than their own employees. Yet, in the typical situation, all employers' contributions are available to provide benefits to all employers' eligible employees. *See Board of Trustees of the Watsonville Frozen Food Welfare Trust Fund v. California Cooperative Creamery*, 877 F.2d 1415, 1420 (9th Cir. 1989).[4] Nor could that delinquent or insolvent employer's vested employee-participants ever receive pension benefits, when, in fact, ERISA requires a pension plan[5] to award ser-

[4] In *California Cooperative Creamery*, the court faced the unusual situation in which a welfare plan had established a form of withdrawal liability to prevent withdrawing employers from leaving the remaining contributing employers to fund the benefits of the withdrawn employer's employees. 877 F.2d at 1420.

[5] This Court has been careful to state that, "[a]lthough most of ERISA's legislative history focused on pension plans, Congress also studied the operation of other employee benefit plans and developed a similar regulatory framework respecting these other plans. For

vice credit without regard to whether an employer has made its required contributions. *Central States*, 472 U.S. at 567 n.7, 579 n.20.

Similarly, in a case recently decided by the United States Court of Appeals for the Ninth Circuit, *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. Sept. 10, 1991), the court rejected the approach of the Second Circuit in the instant case, *id.*, slip op. at 12575; instead, the *Phillips* court viewed the participants as a pool, without regard to the particular employer-employee relationships. The *Phillips* court accepted the fact that, although contributions were made on behalf of all persons working in covered employment, only a fraction of those participants would ever be eligible for benefits. *Phillips*, slip op. at 12574-76. It is axiomatic that any one employer's contributions to a multiemployer plan will be pooled for the theoretical use of all eligible participants, only some of whom will actually receive benefits, for that is the nature and structure of multiemployer plans.[6]

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example, ERISA's rules concerning reporting, disclosure, and fiduciary responsibility apply to all employee benefit plans." *Central States*, 472 U.S. at 569 n.9. Thus, there is no basis in the Act or its legislative history for distinguishing between welfare and pension plans where the issue is one that concerns the basic operation of multiemployer plans, such as the issue in this case.

[6] This Court has emphasized, in a number of decisions, the collective responsibilities of the unions and employers that sponsor multiemployer plans. In *Central States*, the Court decided the issue of whether an employer participating in a multiemployer benefit plan governed by ERISA must allow the plan to conduct an audit involving the records of *all* employees, including records of employees who the employer denied were participants in the plan. In the course of its analysis, the Court reaffirmed its decision in *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), emphasizing the independent nature of multiemployer benefit plans, and the trustees' duty to the needs of the plan as a whole. The Court stated, "as we recognized in *Schneider*, a union's arrangements with a particlular employer might compromise *the broader*

III. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT

The Multiemployer Pension Plan Amendments Act further undercuts the decision below; for, to assert that trustees must transfer plan assets from one fund to another so that the specific contributions made on behalf of specific employees will inure to their benefit only, is to stand both the theory and practice of withdrawal liability on its head. A comprehensive, detailed amendment to ERISA, MPPAA compels an employer that withdraws from a pension plan to pay a share of the unfunded vested benefits of all eligible employees who participate in the plan.

Particularly revealing for purposes of the instant case is the theory under which Congress chose to allocate to a withdrawing employer a portion of the liability for all employee-participants' benefits. When an employer withdraws from a multiemployer plan in a complete withdrawal,[7] the employer is liable to the plan in the amount determined to be its withdrawal liability, or in the words of the statute, "the withdrawal liability of an employer to a *plan* is the amount determined under Section 4211 [of ERISA] to be the allocable amount of unfunded vested benefits." ERISA § 4201, 29 U.S.C. § 1381 (emphasis supplied). To reiterate, the unfunded vested ben-

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interests of the plan as a whole: 'These are multiemployer trust funds. Each of the participating unions and employers has an interest in the prompt collection of the proper contribution from each employer. Any diminution of the fund caused by the arbitration requirements of a particular employer's collective bargaining agreement would have an adverse effect on the other participants.'" *Central States*, 472 U.S. at 576 (citing *Schneider*, 466 U.S. at 373) (emphasis supplied).

[7] With certain exceptions not relevant here, a complete withdrawal occurs under ERISA "when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." ERISA § 4203(a), 29 U.S.C. § 1383(a).

efits are the unfunded vested benefits for the *plan*. That is, if the unfunded vested benefits for a plan are the result of the delinquent contributions of fifty employers other than the withdrawing employer, the withdrawing employer is still liable for a proportionate share of the unfunded vested benefits for that plan.[8] It does not necessarily matter whether the withdrawing employer has fully funded the vested benefits for the individual participants that it employs; it matters only that there are unfunded vested benefits for the plan as a whole. *Caflisch* at 188-89.

Aside from the theoretical underpinnings of withdrawal liability, there is ample evidence in MPPAA that Congress did not intend each employer's contributions to be used only for the benefit of its own employees. Congress included in MPPAA four methods of calculating withdrawal liability, none of which precisely determine the allocable unfunded vested benefits for an individual employer in relation solely to its own employees. Section 4211 of ERISA provides that the unfunded vested benefits allocable to an employer that withdraws from a plan be determined under one of four methods, namely, the "presumptive," "modified presumptive," "rolling five," or

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[8] During the deliberations over MPPAA, the Senate Committee on Labor and Human Resources reported that:

> [Delinquent contributions] detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, *uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.*

Staff of Senate Committee on Labor and Human Resources, S.1076: The Multiemployer Pension Plan Amendments Act of 1980, 96th Cong., 2d Sess. at 233-34 (unnumbered Committee print, April 1980).

"direct attribution" methods. ERISA §§ 4211(b), 4211 (c), 29 U.S.C. §§ 1391(b), 1391(c); 29 C.F.R. § 2642.1 (1988). Each of the methods for calculating withdrawal liability under ERISA Section 4211 does so differently. "[T]he *method adopted* may have a *tremendous impact* on the potential withdrawal liability of employers who contribute to the plan." *Caflisch* at 189 (emphasis supplied).

Congress expressly provided for these variations in the determination of an employer's share of the unfunded vested benefits for a plan; Congress did not seek to make each withdrawing employer liable solely for the unfunded vested benefits of its own employees, but for a share of the unfunded vested benefits of the plan as a whole. Thus, each withdrawing employer pays for the unfunded vested benefits of employee-participants not its own. Likewise, when a withdrawing employer does not contribute its share of the unfunded vested benefits of the plan, or does not contribute a share commensurate with the vested benefits earned by its employee-participants, the employers that remain in the plan cover the cost of those benefits, either through increased contributions, or increased withdrawal liability. *Berkshire*, 874 F.2d at 55 n.2; *Stewart*, 730 F.2d at 1554 n.4.

The decision below is also inconsistent with the fact that, of the four statutory methods of calculation, *only* the direct attribution method "attempts to relate a withdrawing employer's liability to the unfunded vested benefits that are directly related to the employer." *Caflisch* at 190. Yet, the "direct attribution" of an employer's withdrawal liability has been called "unworkable" for most multiemployer plans.

> Many employers may regard the third alternative method, direct attribution, as the most equitable. . . . In practice, however, this approach probably will prove to be unworkable for most plans. In order to be perceived as equitable, direct attribution probably

> would be extremely complex and would require extensive data that most plans do not have. Even if adequate data is available, it may be difficult to obtain agreement on the proper method to use in attributing unfunded vested benefits to employee's [sic] service with particular employees. Finally, it may be argued that *since direct attribution attempts to determine liability as if a multiemployer plan were an aggregate of single employer plans, direct attribution is fundamentally inconsistent with the basic nature of multiemployer plans.*

Caflisch at 190 (emphasis supplied). What the decision below demands, in effect, is that multiemployer plans be treated as aggregates of single employer plans. But this, Congress has chosen not to do.

If the LMRA were really to dictate that no one employer's payments into a multiemployer plan may be used for the benefit of other employers' employees, the LMRA would operate so as to make illegal the imposition of withdrawal liability under ERISA. Yet, ERISA and MPPAA were enacted many years after—not before—the LMRA, and the Congress considered, in depth, the LMRA during the deliberations that led to the drafting and enactment of ERISA. *E.g.*, H. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* III *Legislative History of the Employee Retirement Income Security Act of 1974* 4639, 4641 (1976) (hereinafter "*Legis. Hist.*").

IV. PORTABILITY

Finally, the legislative history of ERISA reveals that Congress considered, at length and in detail, the enactment of a provision that would provide participants with the ability, in some manner, to carry with them their benefits when they left one employer, voluntarily or otherwise, for another.

In the Report of the Committee on Finance for the Senate that accompanied S. 1179, a precursor to ERISA

entitled, "Comprehensive Private Pension Security Act of 1973," the Committee emphasized the policy reasons for trying to find a way to establish "portable" pension rights: "The mobility of labor in the United States has been steadily increasing. . . . On retirement, these employees will have to deal separately with each of their employers . . . and since each employer may have a different type of plan, working out retirement programs may be difficult for these employees." S. Rep. No. 383, 93d Cong., 1st Sess. (1973), *reprinted in* I *Legis. Hist.* 1063, 1140. For these reasons, Congress analyzed the feasibility and desirability of mandating portable benefits for individual employees, and developed a number of proposals for implementing portable pension rights.

The legislative history of ERISA makes it clear that Congress fully considered the problems attendant with the development of portable rights. Congress discussed a central portability fund, but only in voluntary terms, because of the belief that such a central fund was not "workable" on a mandatory basis. The Finance Committee Report on S. 1179 explained one of the difficulties of making the central fund mandatory, stating that "it often would be difficult to place a specific value on the vested rights of an employee in a fixed benefit pension plan in view of the fact that the formulas under which benefits are computed, as well as the actuarial assumptions used, vary widely." S. Rep. No. 383, 93d Cong., 1st Sess. (1973), *reprinted in* I *Legis. Hist.* 1098-99.

Congress had an additional concern: the effect on the funding of a pension plan when employees sought to transfer their individual benefits from the funds. The Report stated that "the compulsory transfer of funds representing an employee's vested rights from an employer's pension plan to the central portability fund would raise further difficulties where the pension plan is not fully funded since *the transfer of funds under such circumstances might be considered detrimental to the re-*

maining covered employees in the pension plan." *Id.* at 1100 (emphasis supplied).

When Congress considered enacting a "portability" provision, it specifically considered those situations where the contributions made to pension funds on behalf of employees would never inure to their benefit. Not only did Congress consider the equity that would result from portable rights for employees who had labored many years to attain pension benefits, but it considered the administrative feasibility of such rights—and it decided, for a variety of reasons, that providing such rights was not feasible.

During the debate on early versions of ERISA, Senator Dole stated, "I do not know whether portability adds much from the employee's point of view, and its administration certainly has many negative aspects for employers and in the creation of another bureaucracy to oversee it. In any event it should be noted that portability [at this stage] is voluntary and there is no intention of making it mandatory." Sept. 18, 1973 Floor Debate on S. 4, *reprinted in* II *Legis. Hist.* at 1876. Similar views were presented in the House. Representative Esch encouraged the establishment of portable rights, but stated that "it should be recognized that any attempt to make vested funds portable from one plan to another is impracticable and administratively unfeasible." H. Rep. No. 533, 93d Cong., 1st Sess. 1973, *reprinted in* II *Legis. Hist.* 2348, 2392.

It is significant that Congress ultimately rejected the notion of portable pension rights. The fact that Congress considered what rights, if any, an employee had to accrued vested benefits when the employee left one employer for another demonstrates that Congress was fully cognizant of the situations in which employees would not gain the benefit from contributions made on their behalf. Congress addressed the notion of "matching" employees to

their accrued benefits. Although Congress rejected "matching," the decision below embraced it.

CONCLUSION

Based on the foregoing, we respectfully urge the Court to issue a Writ of Certiorari.

Respectfully submitted,

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